



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

Investigation on Motion of the Department Of
Natural Resources of an Alleged Unlawful
Construction and Maintenance of a Pier on the Bed
of Long Lake, Spread Eagle Chain, Town of
Florence, Florence County, WI, by Steven
Mannigel

Case No.: 3-NO-98-1900549

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Department of Natural Resources Northern Region staff conducted field investigations and allege that Mr. Steven Mannigel, HC 2, Box 784, Florence, Wisconsin, constructed and is maintaining a pier on the Bed of Long Lake, in Section 33, Township 40 North, Range 19 East in the Town of Florence, Florence County, Wisconsin, in violation of Wis. Stat. §§ 30.12 and 30.13(4) and Wis. Admin. Code ch. NR 326. It is further alleged that this structure, in its current size and configuration, interferes with the rights and interest of the public on Long Lake.

The maintenance of said structure and the use associated with it on Long Lake in violation of Wis. Stat. §§ 30.12, 30.13 and 30.15 and Wis. Admin. Code ch. NR 326, is declared to be a public nuisance by Wis. Stat. § 30.294.

It is alleged, therefore, that said actions by the above named respondent constitute a violation of Wis. Stat. §§ 30.12, 30.13, 30.15 and 30.294 and Wis. Admin. Code ch. NR 326.

Pursuant to due notice hearing was held on March 26, 2001, at Florence, Wisconsin, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Steven Mannigel, by

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Wisconsin Department of Natural Resources, by

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FINDINGS OF FACT

1. Steven Mannigel (Mannigel) owns real property located in Section 33, Township 40 North, Range 19 East, Lot 80, Town of Florence, Florence County. The above-described property abuts Long Lake which is navigable in fact at the project site.

2. In 1989, Mannigel constructed a large pier on the bed of Long Lake in the Spread Eagle Chain of Lakes. At that time, Mannigel was renting the property and was not a riparian owner, although the project was undertaken with the owner's permission. Mannigel subsequently purchased Lot 80 of the Point Pattern Plat, which has approximately 120 feet of riparian frontage.

3. The pier currently consists of three 6-foot by 12-foot sections and three 12 by 12-foot sections. It is 48 feet long and 24 to 36 feet wide at its center. (See: Ex. 5) The pier has been placed permanently and is not removed seasonally. Mannigel does not have a permit for placement of the pier.

4. There is no dispute in the record that the pier grossly exceeds existing DNR guidelines for the placement of a pier without a permit. DNR Water Management Specialist Liesa Nesta testified that according to the current pier planning guidelines, 6 feet is the maximum width for piers without a permit. (Ex. 19) The existing pier requires a permit because it is "too long" and "too wide." (Nesta). The Mannigel pier extends well past the line of navigation, representing the three-foot water depth. Accordingly, the pier requires a permit because it does not meet the pier standards of Wis. Admin. Code § NR 326.04. (Nesta)

Further, there are two benches attached to the pier, including one well away from the area used for the mooring of boats. (Ex. 11) This is a strong indication that the pier is not being used merely as a permissible "aid to navigation" but rather as an unlawful attempt to construct a "deck" on public waters. (Nesta).

5. The DNR conducted a plant survey which compared the nearshore under the Mannigel pier with areas directly outside the structure. (Ex. 23) The survey concluded that the large structure had shaded out sunlight and prevented the growth of plants in the area covered by the pier. Outside the pier area, a very diverse aquatic plant and fish community was evident. (Rasman) Mannigel does not dispute that the pier has had a detrimental impact upon the nearshore area.

6. The existing large pier prevents the growth of aquatic plants by blocking the sunlight in a large portion of the littoral zone. (Rasman) Aquatic plants play a critical role in the

ecology of the inland lake environment. Such plants provide food and habitat for fish, aquatic invertebrates, mammals and birds.

Aquatic plants anchor sediment and help to prevent algae blooms and turbidity in the water. Further, as Mr. Rasman testified, the aquatic plants at the Mannigel site were all high value native plants which provide a natural defense against domination by exotic nuisance species such as eurasian water milfoil (EWM). The existing pier is detrimental to the public interest in Long Lake.

7. There would be detrimental cumulative impacts to the public interest in Long Lake if this project were approved. If every riparian constructed a pier four to six times wider than existing pier standards, a large portion of the littoral zone would be destroyed.

8. Mannigel testified that the prior DNR Water Management Specialist, Neil Kutchery, orally approved the existing design of the pier prior to its construction in 1989. Mannigel produced Mr. Kutchery's card and other information which it appears likely did come from a DNR employee. However, Mannigel did not call Kutchery as a witness to prove his defense of an oral approval. It seems highly unlikely that a DNR Water Management Specialist would have approved this pier without requiring a public notice and a permit. Further, because no permit was in fact obtained, the issue now is whether the pier meets current standards. Clearly it does not.

9. The Department of Natural Resources has complied with the procedural requirements of Wis. Stat. § 1.11 and Wis. Admin. Code ch. NR 150, regarding assessment of environmental impact.

DISCUSSION

The statutory definition of the term "pier" is found at § 30.01(5), Stats. A "pier" is "any structure extending into navigable waters from the shore with water on both sides, built or maintained for the purpose of providing a berth for water craft or for loading or unloading cargo or passengers onto or from water craft. A pier is allowed as an aid to navigation. There is no question that this wide deck-like structure, complete with two benches, is far bigger and more intrusive than a typical pier.

A pier may be placed by a riparian without a permit under certain circumstances. Sec. 30.13, Stat. However, this pier does not meet those requirements. First, the record was clear that the pier extends well beyond the line of navigation, representing a three-foot water depth, as defined in Wis. Admin. Code § NR 326.04(1). Accordingly, the pier clearly requires a permit. Further, because it is so large, the pier has an impact on public rights in navigable waters.

The public trust doctrine reflects an effort by the law to balance the rights of riparians with rights of the public in waters held in public trust. The right of reasonable use of water was one of the rights assured owners adjacent to lakes and streams, others including the right to accretions, relictions, pierages and wharfages. What constitutes a reasonable use, under the common-law test, is a factual determination, varying from case to case, and subject to a trust doctrine concept that sees all natural resources in this state as impressed with a trust for usage

and conservation as a state resource. *State ex. Rel. Chain O'Lakes Assoc. v. Moses*, 53 Wis. 2d 579, 582, 193 N.W.2d 709 (1972).

Mr. Mannigel's pier grossly exceeds a reasonable use by a riparian of public waters. The pier is more like a deck than an access or berthing pier. Nesta testified that the DNR believes a four-foot width is adequate for most boaters, but that the six-foot width is necessary to comply with ADA requirements. To be reasonable, a pier should be no bigger than is necessary. This pier is four to six times as wide as is necessary to allow access and berthing.

There was much undisputed expert testimony documenting direct and cumulative detrimental impacts to the ecology of the littoral zone. The pier shades out aquatic plants and detrimentally impacts the fishery. Mr. Mannigel did not dispute that the pier has a detrimental impact upon the littoral zone. Instead, Mr. Mannigel argues that he reasonably relied on an oral approval of the pier by a former DNR employee. However, the purported oral approval was not established by Mannigel. He did not call Mr. Kutchery, the DNR employee, to testify. Further, at no time prior to the hearing did Mannigel claim that he had received an oral approval from the DNR. It is possible that Mr. Mannigel sincerely believed his pier did not need a permit. But it clearly did in 1989, and does today. He has had twelve years use of a pier that is much bigger than needed. It is time that he reduce the pier to a more reasonable size that does not detrimentally impact the public waters.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under Wis. Stat. §§ 30.03 and 227.43(1)(b) and in accordance with the foregoing Findings of Fact, to conduct hearings and issue necessary orders relating to violations of Wis. Stat. ch. 30.
2. The pier described in the Findings of Fact constitutes a structure within the meaning of Wis. Stat. § 30.12.
3. The applicant is a riparian owner within the meaning of Wis. Stat. § 30.12.
4. If the Department learns of a possible violation of the statutes relating to navigable waters or a possible infringement of the public rights relating to navigable waters, and the Department determines that the public interest may not be adequately served by imposition of a penalty or forfeiture, the Department may proceed as provided in Wis. Stat. § 30.03, either in lieu of or in addition to any other relief provided by law. The Department may order a hearing under ch. 227 concerning the possible violation or infringement, and may request the ALJ to issue an order directing the responsible parties to perform or refrain from performing acts in order to fully protect the interests of the public in the navigable waters. Wis. Stat. § 30.03(4)(a). The pier in question is detrimental to the public interest in navigable waters.
5. The DNR must consider the "cumulative impacts" of many small projects on the public waters of the state. *Sterlingworth Condominium Ass'n v. DNR*, 205 Wis. 2d 710, 721-22, 556 N.W.2d 791 (Wis. Ct. App. 1996) Citing *Hixon v. PSC*, 32 Wis. 2d 608, 631-32, 146

N.W.2d 577, 589 (1966) There would be detrimental cumulative impacts upon the public waters of the state if numerous riparians constructed large deck-like piers in the environmentally-sensitive littoral zone.

6. The project is a type III action under Wis. Admin. Code § NR 150.03(8)(f)4. Type III actions do not require the preparation of a formal environmental impact assessment.

ORDER

IT IS THEREFORE ORDERED that the structure owned by Steven Mannigel constructed on the bed of Long Lake requires a permit from the Department of Natural Resources pursuant to Wis. Stat. § 30.12. Steven Mannigel shall modify the structure in accordance with the Department standards for piers or remove the structure by August 1, 2001.

Dated at Madison, Wisconsin on April 24, 2001.

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By _____
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48, and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.